(2)

Supreme C... FILED

No. 04156 1 MAY 16 2005

OFFICE OF THE CLERK

Supreme Court of the United States

William Bernard Oertwig Jr.,
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals for the
11th Circuit

APPENDIX

William Bernard Oertwig Jr.
Federal Prison Camp
63182-004
PMB 2000
Talladega, Alabama 35160

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United States Court of Appeals
Eleventh Circuit
56 Forsyth Street N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

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www.call.uscourts.gov

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 04-10665-HH
Case Style: USA v. William Bernard Oertwig, Jr.
District Court Number: 03-20265 CR-JIC

The enclosed order has been entered on petition(s) for rehearing.
See Rule 41, Federal rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,
THOMAS K. KAHN, Clerk
Reply to: Debbie Cordell
(404) 335-6219

Encl.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB. 28 2005
THOMAS K. KAHN
CLERK

No. 04-10665-HH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

William Bernard Oertwig, Jr.,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

Before: TJOFLAT, ANDERSON, and WILSON, Circuit Judges

PER CURIUM:
The Petition(s) for Rehearing are DENIED and no number of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 53-5, the Petition(s) for Rehearing En Banc are DENIED.
ENTERED FOR THE COURT

"s/_____"
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COUTRS OF APPEALS
ELEVENTH CIRCUIT
JAN 06 2005
THOMAS K. KAHN
CLERK

No. 04-10665
Non-Argument Calendar

D.C. Docket No. 03-20265-CR-JIC

UNITED STATES OF AMERICA,

Plaintiff-Appellee

Versus

WILLIAM BERNARD OERTWIG, JR.,

Defendant-Appellant

Appeal from the United States District Court for the
Southern District of Florida

(JANUARY 6, 2005)

Before TJOFLAT, ANDERSON and WILSON, Circuit Judges.

PER CURIUM:

William Bernard Oertwig, Jr., a federal prisoner proceeding pro se, appeals his conviction and sentences for six counts of tax evasion (for the years 1996-2001), in violation of 26 U.S.C. § 7201. He presents several tax-

protestation arguments including that (1) he was not a "person" or a "taxpayer" as those terms are defined in the Internal Revenue Code, (2) he holds the status of "non-taxpayer," and (3) the government lacked jurisdiction to tax people within the 50 states. These argument are plainly frivolous and thus warrant no discussion. Oertwig also contends that the indictment was insufficient to state a criminal offense. We turn first to that issue and then address the jurisdiction issues Oertwig raises.

(1) Sufficiency of the Indictment

OERTWIG says that the indictment was insufficient because it (1) did not allege all of the elements of his offense, (2) did not list a "statute coupled with a substantive regulation," and (3) did not give him adequate notice of the charges against him.

Oertwig's contentions are without merit. First, the elements of a tax evasion offense under 26 U.S.C. § 7201 are: "(1) willfulness; (2) existence of a tax deficiency; and (3) an affirmative act constituting and evasion of the tax." United States v Kaiser, 893 F.2d 1300, 1305 (11th Cir. 1990). Each count of Oertwig's indictment alleges that he "did willfully attempt to evade and defeat a substantial part of the income tax due and owing by him to the United States of America" for the stated year. As for the existence of a deficiency, each count alleges that Oertwig reported his taxable income as $0, when in fact he knew his taxable income was substantially in excess of $0. With regard to an affirmative act, the counts allege that Oertwig filed a false W-4 form through his employer, prepared and signed a false and fraudulent individual income tax return, and filed the return. Thus, each count of the indictment alleges all of the elements of the offense.

Also without merit is Oertwig's claim that the indictment did not list a statute and a substantive implementing regulation, as required by Rule 7 of the Federal Rules of Criminal Procedure. That Rule provides, "For each count, the indictment or information must give the official or customary citation of the statute, rule,

regulation, or other provision of law that the defendant is alleged to have violated." Fed. R. Crim. P. 7(c)(1) (emphasis added). It does not mandate that the indictment include both a statute and an implementing regulation. See id. Oertwig's indictment listed 26 U.S.C. § 7201 as the statutory basis for the charge in each count and therefore satisfied Rule 7. Additionally, contrary to his contention, Oertwig received adequate notice of the charges against him because his indictment referenced the statute. See United States v. Stefan, 784 F.2d 1093, 1101-02 (11th Cir. 1986).

(2) Jurisdictional Issues

Oertwig contends that the district court lacked jurisdiction over his case because (1) the United States did not suffer an injury-in-fact, (2) in imposing income taxes, Congress exceeded its power under the Commerce Clause, and (3) the Government's attorney of record in the case did not file a formal notice of appearance.

Oertwig's argument concerning the government's lack of injury is meritless. Injury-in-fact is a civil doctrine that has no relevance in this criminal action. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992).

Nor is Oertwig entitled to relief on his claim that Congress exceeds its power under the Commerce Clause. Oertwig ignores the fact that Congress does not act pursuant to its Commerce Clause power when it imposes an income tax on individual. The constitutional authority fir income taxation is the Sixteenth Amendment, which provides, "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived...." U.S. Const. Amend. XVI.

Finally, there is no merit in Oertwig's claim that the court lacked jurisdiction to try the case because the Government's attorney failed to file a notice of appearance. The local rules for the Southern District of Florida provide that the filing of any pleading in an action constitutes an

appearance by the attorney who signs the pleading. S.D. Fla. Local Rule 11.1(D)(1).

Because there is no basis for the setting aside any of Oertwig's convictions or sentences, the district court's judgment is

AFFIRMED.

United States District Court
Southern District of Florida
FT. LAUDERDALE DIVISION

Filed by _____ D.
FEB 0 3 2004
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA. FT. LAUD.

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

Case Number:
0:03CR20265-COHN

WILLIAM BERNARD OERTWIG, JR.

Counsel for Defendant: JACK R. BLUMENFELD
Counsel for The United States: ANITA J. GAY
Court Reporter: ANITA LAROCCA

The defendant was found guilty on Counts 1 THRU 6 of the indictment.
ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s);

TITLE/SECT. NUMBER	NATURE OF OFFENSE	DATE OFFFENSE CONCLUDED	COUNT
26 U.S.C. 7201	Attempt to evade and Defeat tax.	4-14-1977	I
26 U.S.C. 7201	Attempt to evade and defeat tax.	4-14-1998	II

26 U.S.C. 7201	Attempt to evade and defeat tax.	4-12-1999	III
26 U.S.C. 7201	Attempt to evade and defeat tax.	4-15-2000	IV
26 U.S.C. 7201	Attempt to evade and defeat tax.	4-15-2001	V
26 U.S.C. 7201	Attempt evade and defeat tax.	4-15-2002	VI

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FUJRTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, cost and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and the United States attorney of any material changes in the defendant's economic circumstances.

Defendant's Soc. Sec No. 262-06-9725
Defendant's Date of Birth: 11-24-1952
Deft's U.S. Marshal No.: 63182-004

Date of imposition of Sentence
January 29, 2004

Defendant's Mailing Address:
19600 S.W. 207th Avenue
MIAMI, FLORIDA 33187

"s/_____"
JAMES I. COHN
United States District Judge

February 03, 2004

DEFENDANT: WILLIAM BERNARD OERTWIG, JR.
CASE NUMBER: 0:03CR20265-COHN

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 41 MONTHS AS TO COUNTS 1 THRU VI TO RUN CONCURRENTLY WITH EACH OTHER.

The Court makes the following recommendations to the Bureau of Prisons:

THE DEFENDANT DE DESIGNATED TO A FACILITY IN MIAMI.

The defendant is remanded to the custody of the United States marshal

Return

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

DEFENDANT: WILLIAM BERNARD OERTWIG, JR.,
CASE NUMBER: 0:03CR20265-COHN

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 YEARS AS TO COUNTS 1 THRU 6 TO RUN CONCURRENTLY WITH EACH OTHER.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13. 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commence in accordance with the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without permission of the court or probation officer;

2. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. the defendant shall answer truthfully all inquires by the probation officer and follow the instructions of the probation officer;

4. the defendant shall support his or her dependants and meet other family responsibilities;

5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. the defendant shall notify the probation officer at least ten (10) day prior to any change in residence or employment;

7. the defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substance, except as prescribed by a physician;

8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. the defendant shall not associate with any person engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. as directed by the probation officer, the defendant shall notify third parties of risk that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall maintain full-time employment and not be unemployed for a term of more that 30 days, unless excused by the U.S. Probation Officer. Further, the defendant shall provide documentation, including but not limited to, pay stubs, contractual agreements, W-2 Wages and Earnings Statements, and any other documents requested by the U.S. Probation Office.

The defendant shall cooperate fully with the Internal Revenue Service in determining and paying any tax liabilities related to the prosecution of this case. The defendant shall provide to the Internal Revenue Service all requested documents and information for purposes of any civil audits, examinations, collections, or other proceedings. It is further ordered that the defendant shall file accurate income tax returns for the prosecution years and pay all taxes, interest, and penalties due and owing by him to the Internal Revenue Service.

The defendant shall obtain prior written approval from the U.S. Probation Officer before entering into any self-employment.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$600.00	$50,000.00	$

*Findings for the total amount of losses are required under Chapter 109A, 110, 110A, and 113A of Title 18, United

States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A. Lump sum payment of $600.00 due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period on imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the U.S. COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) cost, including cost of prosecution and court cost.

UNITED STATES DISTRICT COURT
SOIUTHERN DISTRICT OF FLORIDA
CASE NO. 03-20265 CR-GOLD

MAGISTRATE JUDGE
SIMONTON
FILED _____
03 MAR 27 PM 2:30

UNITED STATES OF AMERICA
vs.
WILLIAM BERNARD OERTWIG, JR.,
Defendant

INDICTMENT

The Grand Jury charges that:

COUNT 1

Attempt to Evade and Defeat Tax
(26 U.S.C. § 7201)

From on or about April 13, 1996, and continuing until on or about April 14, 1997, in Miami-Dade County, in the Southern District of Florida and elsewhere, the defendant,

WILLIAM BERNARD OERTWIG, JR.,

a resident of Miami, Florida, did willfully attempt to evade and defeat a substantial part of the income tax due and owing by him to the United States of America for calendar year 1996, by filing a false W-4 form through his employer, the Miami-Dade County and by preparing and causing to be prepared, and by signing and causing to be signed, a false and fraudulent individual U.S. Income Tax Return, Form 1040, on behalf of himself, which was filed with the Internal Revenue Service, wherein it was stated that his taxable income for calendar year 1996, was the sum of $0, and that the amount of tax due and owing thereon was the sum of $0, whereas, as he then and there well knew and believed, his taxable income for the calendar year 1996 was substantially in excess of $0, and that upon said additional taxable income, a substantial additional tax was due and owing to the United States of America.

In violation of Title 26, United States Code, Section 7201.

COUNT 2

Attempt to Evade and Defeat Tax

(26 U.S.C. § 7201)

From on or about March 17, 1997, and continuing until on or about April 14, 1998, in Miami-Dade County, in the Southern District of Florida and elsewhere, the defendant,

WILLIAM BERNARD OERTWIG, JR.,

a resident of Miami, Florida, did willfully attempt to evade and defeat a substantial part of the income tax due and owing by him to the United States of America for calendar year 1997, by filing a false W-4 form through his employer, the Miami-Dade County and by preparing and causing to be prepared, and by signing and causing to be signed, a false and fraudulent individual U.S. Income Tax Return, Form 1040, on behalf of himself, which was filed with the Internal Revenue Service, wherein it was stated that his taxable income for calendar year 1997, was the sum of $0, and that the amount of tax due and owing thereon was the sum of $0, whereas, as he then and there well knew and believed, his taxable income for the calendar year 1997 was substantially in excess of $0, and that upon said additional taxable income, a substantial additional tax was due and owing to the United States of America.

In violation of Title 26, United States Code, Section 7201.

COUNT 3

Attempt to Evade and Defeat Tax

(26 U.S.C. § 7201)

From on or about April 14, 1998, and continuing until on or about April 12, 1999, in Miami-Dade County, in the Southern District of Florida and elsewhere, the defendant,

WILLIAM BERNARD OERTWIG, JR.,

a resident of Miami, Florida, did willfully attempt to evade and defeat a substantial part of the income tax due and owing by him to the United States of America for calendar year 1998, by filing a false W-4 form through his employer,

the Miami-Dade County and by preparing and causing to be prepared, and by signing and causing to be signed, a false and fraudulent individual U.S. Income Tax Return, Form 1040, on behalf of himself, which was filed with the Internal Revenue Service, wherein it was stated that his taxable income for calendar year 1998, was the sum of $0, and that the amount of tax due and owing thereon was the sum of $0, whereas, as he then and there well knew and believed, his taxable income for the calendar year 1998 was substantially in excess of $0, and that upon said additional taxable income, a substantial additional tax was due and owing to the United States of America.

In violation of Title 26, United States Code, Section 7201.

COUNT 4

Attempt to Evade and Defeat Tax

(26 U.S.C. § 7201)

From on or about January 15, 1999, and continuing until on or about April 15, 2000, in Miami-Dade County, in the Southern District of Florida and elsewhere, the defendant,

WILLIAM BERNARD OERTWIG, JR.,

a resident of Miami, Florida, did willfully attempt to evade and defeat a substantial part of the income tax due and owing by him to the United States of America for calendar year 1999, by filing a false W-4 form through his employer, the Miami-Dade County and by preparing and causing to be prepared, and by signing and causing to be signed, a false and fraudulent individual U.S. Income Tax Return, Form 1040, on behalf of himself, which was filed with the Internal Revenue Service, wherein it was stated that his taxable income for calendar year 1999, was the sum of $0, and that the amount of tax due and owing thereon was the sum of $0, whereas, as he then and there well knew and believed, his taxable income for the calendar year 1999 was substantially in excess of $0, and that upon said additional taxable income, a substantial additional tax was due and owing to the United States of America.

In violation of Title 26, United States Code, Section 7201.

COUNT 5

Attempt to Evade and Defeat Tax

(26 U.S.C. § 7201)

From on or about February 17, 2000, and continuing until on or about April 15, 2001, in Miami-Dade County, in the Southern District of Florida and elsewhere, the defendant,

WILLIAM BERNARD OERTWIG, JR.,

a resident of Miami, Florida, did willfully attempt to evade and defeat a substantial part of the income tax due and owing by him to the United States of America for calendar year 2000, by filing a false W-4 form through his employer, Miami-Dade County, and by failing to make an income tax return on or before April 15, 2001, as required by law, to any proper officer of the Internal Revenue Service, and by failing to pay income tax to the Internal Revenue Service that was due and owing to the United States of America.

In violation of Title 26, United States Code, Section 7201.

COUNT 6

Attempt to Evade and Defeat Tax

(26 U.S.C. § 7201)

From on or about January 22, 2001, and continuing until on or about April 15, 2002, in Miami-Dade County, in the Southern District of Florida and elsewhere, the defendant,

WILLIAM BERNARD OERTWIG, JR.,

a resident of Miami, Florida, did willfully attempt to evade and defeat a substantial part of the income tax due and owing by him to the United States of America for calendar year 2001, by filing a false W-4 form through his employer, Miami-Dade County, and by failing to make an income tax return on or before April 15, 2002, as required by law, to any proper officer of the Internal Revenue Service, and by failing to pay income tax to the Internal Revenue Service that was due and owing to the United States of America.

In violation of Title 26, United States Code, Section 7201.

A TRUE BILL

"s/ _____"
FOREPERSON

"s/ _____"
MARCOS DANIEL JIMINEZ
UNITED STATES ATTORNEY

"s/ _____"
ANITA J. GAY
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO: 03-20265-CR-COHN

FILED _____
AUG 25 2003
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA. FT. LAUD.

UNITED STATES OF AMERICA,
V.
WILLIAM BERNARD OERTWIG, JR.,
Defendant

GOVERNMENT'S TRAIL BRIEF

COMES NOW the United States of America, this 21ST day of August, 2003, by and through the undersigned counsel and files this Trial Brief.

I. STATUS OF THE CASE

On March 27, 2003, a Federal Grand Jury in the Southern Judicial District of Florida, returned an indictment against the above-referenced defendant. Defendant Oertwig was charged with six counts of tax evasion, in violation of Title 26, United States Code, Section 7201, for tax evasion for years 1996 through 2001.

II. STATEMENT OF FACTS

The United States alleges that Oertwig willfully attempted to evade or defeat his 1996 through 2001 income tax liabilities by filing frivolous income tax returns for years 1996 through 1999 and 2001, and by failing to file an income tax returns for year 2000. It is further alleged that Oertwig, in an effort to conceal his income and assets from the Internal revenue Service, transferred all of his assets, including his personal residence, three vehicles, and his personal bank account, to various fictitious entities, he call unincorporated business trust organizations. During these relevant years, Oertwig earned over $500,000 in income from his salary as an officer with the Miami-Dade Police

Department, from an annuity he purchased, from the sale of real estate, and from the operation of his alarm monitoring business, and paid little or no federal income taxes.

III. OFFENSES CHARGED

The Defendant is charged with six counts of tax evasion, in violation of Title 26. United States Code, Section 7201. In order to convict a defendant for tax evasion, the United States must prove the following elements:

1. An attempt to evade or defeat a tax or payment thereof.
2. An additional tax due and owing.
3. Willfulness.

26 U.S.C. § 7201; Sansone v. United States, 380 U.S. 343, 351 (1965); United States v. Hogan, 861 F.2d 312, 315 (1st Cir. 1988) United States v. Sorrentino, 726 F.2d 876, 879 (1st Cir. 1984).

An Attempt To Evade Or Defeat A Tax

Section 7201 expressly provides that the attempt to evade a tax can be carried out "in any manner." Any affirmative act, "the likely effect of which would be to mislead or to conceal," may constitute an affirmative act of evasion. United States v. Spies, 317 U.S. 492, 499 (1943). Even an activity that would otherwise be legal can constitute an affirmative act supporting a section 7201 conviction, so long as it is carried out with the intent to evade tax. See id. ("willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making records usual in the transactions of the kind, and any conduct, the likely effect of which would mislead or to conceal"); United States v. Barakat, 130 F.3d 1448(11th Cir. 1997) (noting that sophisticated means enhancement applied to acts of concealment that include making payments to trust to avoid IRS Form 1099 reporting requirement); United States v. Waldeck, 909 F.2d 555, 559

(1st Cir. 1990) (filing fifth amendment returns and filing false W-4 affirmative acts of evasion); United States v. Edwards, 777 F.2d 644, 650 (11th Cir. 1985) (concealment of income affirmative act of evasion); United States v. Daniels, 617 F.2d 146, 148-149 (5th Cir. 1970) (collecting cases establishing affirmative acts of evasion); United States v. Stone, 431 F.2d 1286, 1288 (5th Cir. 1970) (persistent pattern of under reporting income and cash checks and depositing cash affirmative acts of evasion).

It should be noted that courts have uniformly held that filing a false Form W-4 constitutes an affirmative act of evasion. United States v. Waldeck, 909 F.2d 555 (1st. Cir. 1990); United States v. DiPetto, 936 F.2d 96 (2nd Cir. 1991); United States v. Williams, 928 F.2d 145 (5th Cir. 1991).

Although the government must prove some affirmative act constituting an attempt to evade, it need not prove each act alleged. See United States v. Mackey, 571 F.2d 376, 387 (7th Cir. 1978) (prosecution must prove some affirmative act but need not prove each affirmative act alleged); see also United States v. Conely, 826 F.2d 551, 556-57 (7th Cir. 1987).

Tax Due And Owing

In addition to proving that the defendant committed an affirmative act of evasion, the government must also prove that the defendant attempted to evade a substantial tax. The government need not prove the precise amount of tax due and owing. Rather as long as the amount of tax due and owing is substantial in relation to the amount of tax the defendant reported or paid, it makes no difference whether the tax due and owing proved at trial is more or less than the amount charged as reported in the indictment. United States v. Johnson, 319 U.S. 503, 517-18 (1943) (to require meticulous proof would be tantamount to holding that skillful concealment is an invincible barrier to proof); United States v. Mounkes, 204 F.3d 1024, 1028 (10th cir. 2000); United States v. Citron, 783 F.2d 307, 315 (2nd Cir. 1986(, (holding "open-ended" 7201 indictment that did not even allege precise amounts of unreported income or tax due but rather alleged that the3 defendant had

attempted to evade "a larger part" of the income tax due and that the tax due was "substantially in excess" of the amount he reported); United States v. Costello, 221 F.2d 668, 675 (2d Cir. 1955) (upholding a conviction where the bill or particulars alleged $244,000 gross income as unreported and $288,000 was proved at trial).

Willfulness

The term willfully as used in the context of criminal prosecution for tax evasion means an intentional violation of a known legal duty. United States v. Pompino, 429 U.S. 10, 12 (1976); United States v. Olbres, 61 F.3d 967, 970 (1995). Willfulness is determined by a subjective standard; thus, the defendant is not required to have been objectively reasonable in his misunderstanding of his legal duties or belief that he was in compliance with the law. Cheek v. United States, 498 U.S. 192, 203 (1991). The inquiry, therefore, must focus on the knowledge of the defendant, not on the knowledge of a reasonable person. Id. However, the jury may "consider the reasonableness of the defendant's asserted beliefs in determining whether the belief was honestly or genuinely held." Id.

Willfulness can be inferred from placing property or a business in the name of another. United States v. Woodner, 317 F.2d 649, 651 (2nd Cir.) *cert. denied*, 375 U.S. 903 (1963). Evidence of a consistent pattern of underreporting large amounts of income can also tend to prove wilfulness (sic.). United States v Kim, 884 F.2d 189, 192 (5th Cir. 1989). Wilfulness (sic) can also be inferred by evidence of extensive use of currency and cashier's checks. United States v. Kim, 884 F.2d 189, 192 (5th Cir. 1989). Bank accounts held under fictitious names also may show the defendant acted willfully. United States v. Ratner, 464 F.2d 101 (9th Cir. 1972).

IV. OTHER ISSUES

Tax Protester Arguments

The United States expects that during the trial of this matter, one or more of the defendants may seek to testify about, allude or refer to, or argue to the jury, either in

response to questions or as part of a non-responsive answer, or attempt to present for the purpose of proving, the following misstatements of established law:

1. Individuals are not liable for taxes;
2. Wages are not income;
3. The Sixteenth Amendment was not properly ratified;
4. Filing Income tax returns is voluntary;
5. The defendant is not a "Person" or "Citizen" within the meaning of the Internal Revenue Code;
6. Federal Income Tax laws are unconstitutional;
7. State or Commonwealth Citizenship exempts persons from Federal Income Tax requirements; or
8. A person is justified in not paying or filing taxes if they disagree with the government spending policies.

Should any of the defendants attempt to interject any of the above-listed arguments, the Government will object to the introduction of same and seek to limit the amount of testimony or other evidence directed toward these arguments for the following reasons.

First, the Supreme Court has made it clear that any argument, evidence or allegation that some or all of the tax code is unconstitutional or not valid, is not relevant and need not be head by a jury. In United States v. Cheek, 498 U.S. 192, 205 (1991) the Court held that:

> [c]laims that some of the provisions of the tax code are unconstitutional are submissions of a different order. They do not arise from innocent mistakes caused by the complexity of the Internal Revenue Code. Rather, the reveal full knowledge of the provisions at issue and a studied conclusion, however wrong, that those provisions are invalid and unenforceable.

The Cheek Court concluded:

> [w]e thus hold that in a case like this, a defendant's views about the validity of the tax statutes are irrelevant to the issue of willfulness and need not be heard by the jury, and, if they are3, an instruction to

disregard them would be proper. For the purpose it makes no difference whether the claims of invalidity are frivolous or have substance.

United States v. Cheek, 498 U.S. 192, 206 (1991).

Next, regarding any argument that any of the defendants might set forth claiming ignorance of, or a misunderstanding of, the law, the government will seek to limit the evidence presented on such issues pursuant to Federal Rules of Evidence 401, 402, and 403. The United States, in full recognition of the defendant's right to present evidence tending to show the lack of willfulness will argue that testimony regarding such tax protester rhetoric is not relevant and should not be admitted. Moreover, the Government will also argue that any relevance is substantially outweighed by the danger of confusing the jury. In sum, the Government will ask the Court to use its broad discretion in controlling the introduction of such evidence and "to insure that witnesses are treated fairly and the search for truth is not impaired by presentation of extraneous, prejudicial or confusing material." United States v. Gravely, 840 F.2d 1156, 1163 (4th Cir. 1988). See also, United States v. Neujahr, 173 F.3d 853, 1999 WL 125718, (4th Cir. 1999); United States v. Fingado, 934 F.2d 1163, 1165 (10th Cir. 1987).

VI. CONCLUSION

The foregoing is a summary of some of the points that the Government anticipates are likely to arise at trial. Should any legal issues arise that are not covered in this trial brief, the Government respectfully request leave to submit further memoranda as necessary to assist the Court.

Respectfully submitted this 25th day of August, 2003.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand delivered to Mr. Blumenfield, this 25th day of August, 2003:

"s/ _____
Anita J. Gay
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